APE Electrical Sdn Bhd v Chandra Segar a/l L Marullamulth & Anor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-02(NCVC)(W)-1785–09 OF 2018 AND B-02(NCVC)(W)-1786–09 OF 2018

YAACOB MD SAM, RAVINTHRAN AND GUNALAN MUNIANDY JJCA

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Contract — Agreement — Agreement between plaintiff and defendant — Whether agreement was a money lending or sale and purchase transaction — Whether sale and purchase agreements were sham documents — Whether alleged interest payment proven — Whether first defendant was moneylender — Whether there was misrepresentation against plaintiff — Moneylenders Act 1951

Misrepresentation — Representation by defendant's consultant to plaintiff — Whether there was innocent misrepresentation — Whether plaintiffs were misrepresented into signing sale and purchase agreements — Whether there was false statement of fact — Contracts Act 1950 s 18

This was an appeal for two cases, Appeal No 1785 and Appeal No 1786 ('the first and second appeals'). The first appeal was by the first defendant in the civil suit in Shah Alam High Court whereas the second appeal was by the plaintiffs in the same civil suit. The appellant ('the first defendant') in the first appeal was dissatisfied with the High Court's decision in allowing the plaintiff's claim and in dismissing his counterclaim whereas the appellants ('the plaintiffs') in the second appeal were dissatisfied with the High Court's decision to invoke s 66 of the Contracts Act 1950 and consequently, to order restitution to the original position three pieces of landed properties that originally belonged to the plaintiffs that were the subject of the suit before the High Court ('the subject properties'). The plaintiffs were facing financial constraints in their businesses and approached an acquaintance known as Ang Jenjarom ('Ang') to assist the plaintiffs to obtain a loan in the sum of RM1.25m. Ang then introduced the plaintiffs to moneylenders by the name of Thomas Ang and Tham who then agreed to lend the said sum on condition that the plaintiff pledged their properties as security for the loan with interest payable at 6% per month and a further condition that loan agreements were to be entered for the said loan. Thomas Ang and Tham later brought the plaintiffs to the second defendant's office. The plaintiffs contended that, before signing the said documents which had already been prepared by the second defendant for the said loan, the second

defendant allegedly represented to the plaintiffs that the documents were only loan documentation and that once the plaintiffs had fully settled the said loan, the said documents would be cancelled. The plaintiffs signed the documents and requested the second defendant to forward all copies of the documents signed so that the plaintiffs could refer to their own solicitor for comments. The said documents were never forwarded to the plaintiffs. The second defendant issued cheques in the sum of RM438,318.10 and RM11,000 respectively to the first plaintiff and sum of RM54,595 to the second plaintiff which the plaintiffs were asked to collect on 27 January 2015, of which the plaintiffs did as requested. The plaintiffs could not comply with the conditions of paying the interest thereafter, and Thomas Ang and Tham became violent and threatened the plaintiffs. The act of Thomas Ang and Tham had put the plaintiffs in a position of fear for their safety and that of their family. The first plaintiff then lodged several police reports. Following a search conducted on the subject properties, it was revealed that the subject properties had been transferred to/registered in the name of the first defendant who had also lodged a private caveat on the subject properties. It was contended by the plaintiffs that at no time had they intended to transfer the said properties to the first defendant. In the said circumstances, the plaintiffs lodged private caveats on the said properties. The plaintiffs claimed that they were misrepresented into signing three sale and purchase agreements and two supplemental agreements which the plaintiffs' thought were loan documents. The first defendant filed a counterclaim alleging that they had overpaid the plaintiffs for the purchase of the subject properties. The second defendant contended that there was no misrepresentation or money lending transaction but instead only bona fide sale and purchase transactions for the subject properties. After a full trial, the learned judicial commissioner ('LJC') found that the plaintiffs and the first defendant were in a money lending arrangement and the sale and purchase transaction was illegal and void under s 24 of the Contracts Act 1950. The plaintiff's claim and first defendant's counterclaim were dismissed, and the plaintiffs and first defendant were ordered to restore whatever advantages they had received from each other. Dissatisfied with the said decision, both the plaintiffs and the first defendant lodged respective appeals.

Held, allowing the first defendant's appeal; dismissing the plaintiff's appeal:

(1) The explanation by the second defendant for the presence of three persons at the second defendant's office at the material time was highlighted as being of significance. It was that their presence was merely to ensure that the consultation or introductory fee was paid. It would, therefore, appeared to be correct as contended that the LJC had made a baseless inference to the effect that APE was the boss or employer referred to in the SMS text. It bore reiteration that the contents of the SMS texts figured prominently in the LJC's finding that APE's role in the impugned

transactions was as an employer. It followed that the factual basis for the LJC's finding was plainly misconceived (see para 48).

(2) The court agreed with the defendants that the first plaintiff sought to provide vide the witness statement material facts and not mere details relating to how and to whom the alleged interest payment was to be made. If, as alleged, LWK was the runner or collector for TA and Ang, LWK was indeed a material witness and being called as a witness was crucial to resolve the issue as to whether interest payments were demanded from the plaintiffs and received by APE considering that there was no evidence at all of the receipt. It was clearly an instance of error of law by the LJC in failing to invoke s 114(g) of the Evidence Act 1950 and draw an adverse inference against the plaintiffs (see para 50).

(3) In respect of all the three SPAs, the encumbrances were clearly spelt out in Recital II. Recital IV on which the LJC based his finding stipulated that the properties were to be sold free from encumbrances, not that the same were free from any encumbrances. Premised from a misreading of Recital II and IV of the SPAs, the LJC had arrived at a wrong finding that the three properties according to the SPAs were to be free from encumbrances and that the increase of the purchase price to RM1.6m each was to cover redemption, arrears and other expenditure (see para 51).

(4) The LJC had failed to sufficiently appreciate and give due weight to the undisputed fact that the first defendant had fully paid the purchase price with the completion dates of the SPAs and the extended completion date of the supplemental agreements. The first defendant had fulfilled its contractual obligations in relation to the agreed terms of payment (see para 52).

(5) The court agreed with the second defendant's contention that the finding of the LJC was erroneous because firstly, it was never the plaintiff's pleaded case that the first defendant was a moneylender and secondly, the finding was plainly incorrect, as it was based on an assumption that the sum allegedly paid by the first plaintiff was an excessive interest when the payment itself was not supported by any evidence. While the court appreciated the provision of s 10OA of the Moneylenders Act 1951 that the proof of a single loan at interest shall raise the presumption of moneylending business by the lender, it was trite law that proof of carrying on a moneylending business required evidence of some degree of system and continuity in a moneylending transaction which was absent in the present case. Therefore, the primary premise of the plaintiffs' claim, namely, that the SPAs executed in respect of the properties with the first defendant was in truth sham moneylending transactions was on the totality of the evidence clearly not established. It was a plain and

obvious error on the part of the LJC to find otherwise and make the impugned orders against the first defendant (see paras 53–54 & 58).

(6) The court was inclined to agree with the second defendant's contention that if there was indeed any misrepresentation by the second defendant as the common SPA solicitor for both parties, it could only be an act of innocent misrepresentation on the pleadings alone. The plaintiffs had clearly failed to prove that the second defendant had made a false statement as to the documents that the plaintiffs signed at the plaintiffs' office. As the core element of the tort of misrepresentation had not been proved, the claim founded on it was not sustainable as concluded by the LJC (see paras 62 & 66).

[Bahasa Malaysia summary

Ini adalah rayuan bagi dua kes iaitu Rayuan No 1785 dan Rayuan No 1786 ('rayuan pertama dan kedua'). Rayuan pertama adalah oleh defendan pertama dalam saman sivil di Mahkamah Tinggi Shah Alam manakala rayuan kedua oleh plaintif dalam saman sivil yang sama. Perayu ('defendan pertama') dalam rayuan pertama tidak berpuas hati dengan keputusan Mahkamah Tinggi yang membenarkan tuntutan plaintif dan menolak tuntutan balasnya manakala perayu ('plaintif) dalam rayuan kedua tidak berpuas hati dengan keputusan Mahkamah Tinggi yang mengguna pakai s 66 Akta Kontrak 1950 dan memerintahkan pengembalian kepada kedudukan asal tiga bidang tanah yang asalnya milik plaintif yang menjadi perkara asas saman di hadapan Mahkamah Tinggi ('hartanah tersebut'). Plaintif mengalami masalah kewangan dalam perniagaan mereka dan mendekati kenalan, iaitu Ang Jenjarom ('Ang') untuk membantu plaintif mendapatkan pinjaman untuk jumlah RM1.25 juta. Ang kemudian memperkenalkan plaintif kepada pemberi pinjam wang dengan nama Thomas Ang dan Tham yang kemudian bersetuju untuk meminjamkan jumlah tersebut dengan syarat plaintif menyerahkan hartanah mereka sebagai jaminan untuk pinjaman itu dengan faedah yang perlu dibayar pada kadar 6% sebulan dan syarat selanjutnya bahawa perjanjian pinjaman harus ditandatangani pihak-pihak. Thomas Ang dan Tham kemudian membawa plaintif ke pejabat defendan kedua. Plaintif berhujah bahawa, sebelum menandatangani dokumen-dokumen tersebut yang telah disediakan oleh defendan kedua bagi pinjaman tersebut, defendan kedua memberitahu plaintif bahawa dokumen-dokumen tersebut hanyalah dokumen pinjaman dan apabila plaintif telah menyelesaikan sepenuhnya pinjaman tersebut, dokumen-dokumen tersebut akan dibatalkan. Plaintif menandatangani dokumen itu dan memohon defendan kedua mengemukakan semua salinan dokumen yang ditandatangani supaya plaintif boleh merujuk kepada peguamcara mereka sendiri untuk mendapatkan ulasan. Dokumen tersebut tidak pernah diberikan kepada plaintif. Defendan kedua pula telah mengeluarkan cek masing-masing sebanyak RM438,318.10 dan RM11,000 kepada plaintif pertama dan RM54,595 kepada plaintif kedua yang diminta

A oleh plaintif pada 27 Januari 2015. Plaintif tidak dapat mematuhi syarat-syarat membayar faedah selepas itu, dan Thomas Ang dan Tham menggugut plaintif-plaintif. Perbuatan Thomas Ang dan Tham telah menyebabkan plaintif takut akan keselamatan mereka dan keluarga mereka. Plaintif pertama kemudian membuat beberapa laporan polis. Berdasarkan carian ke atas
B hartanah tersebut, didapati bahawa hartanah tersebut telah didaftarkan atas nama defendan pertama yang juga telah memasukkan kaveat ke atas hartanah tersebut. Plaintif menghujahkan bahawa pada bila-bila masa mereka tidak berhasrat untuk memindahkan harta tersebut kepada defendan pertama. Dalam keadaan tersebut, plaintif-plaintif telah membuat kaveat ke atas
C hartanah tersebut. Plaintif mendakwa mereka terkhilaf ketika menandatangani tiga perjanjian jual beli dan dua perjanjian tambahan yang difikirkan plaintif adalah dokumen pinjaman. Defendan pertama memfailkan tuntutan balas dengan mendakwa bahawa mereka telah terlebih bayar kepada plaintif untuk pembelian hartanah tersebut. Defendan kedua menghujahkan bahawa tiada
D salah nyata atau aktitivi peminjaman wang sebaliknya hanya transaksi jual beli secara bona fide bagi hartanah tersebut. Selepas perbicaraan penuh, pesuruhjaya kehakiman ('PK') mendapati bahawa plaintif dan defendan pertama berada terlibat dengan aktiviti peminjaman wang dan transaksi jual beli itu tidak sah dan terbatal di bawah s 24 Akta Kontrak 1950. Tuntutan
E plaintif dan tuntutan balas defendan pertama ditolak, dan plaintif dan defendan pertama diperintahkan untuk mengembalikan faedah yang diterima. Tidak berpuas hati dengan keputusan tersebut, kedua-dua plaintif dan defendan pertama memfailkan rayuan masing-masing.

F **Diputuskan**, membenarkan rayuan defendan pertama; menolak rayuan plaintif:

(1) Penjelasan oleh defendan kedua mengenai kehadiran tiga orang di pejabat defendan kedua pada masa material adalah penting. Kehadiran
G mereka hanyalah untuk memastikan bahawa bayaran rundingan atau pengenalan telah dibayar. Oleh itu, PK membuat inferens yang tidak berasas bahawa APE adalah bos atau majikan yang disebut di dalam SMS. Kandungan teks SMS menunjukkan peranan APE dalam transaksi tersebut sebagai majikan. Berdasarkan fakta, PK jelas terkhilaf dalam kes
H ini (lihat perenggan 48).

(2) Mahkamah bersetuju dengan defendan-defendan bahawa plaintif pertama melalui pernyataan saksi mengenai fakta-fakta material dan bukan butiran semata-mata menunjuk kepada siapa bayaran faedah itu dibuat. Jika seperti yang didakwa, LWK adalah runner atau pengumpul
I untuk TA dan Ang, LWK sememangnya saksi material untuk menyelesaikan isu sama ada bayaran faedah dituntut daripada plaintif dan diterima oleh APE. Tiada bukti sama ada pembayaran faedah dituntut daripada plaintif dan diterima oleh APE. PK telah terkhilaf apabila tidak membangkitkan s 114(g) Akta Keterangan 1950 untuk

membuat inferens berbalik/buruk terhadap plaintif (lihat perenggan 50).

(3) Berdasarkan ketiga-tiga SPA, halangan-halangan jelas dinyatakan dalam perkara II. PK merujuk kepada perkara IV yang memutuskan bahawa hartanah tersebut akan dijual bebas dari halangan, ianya tidak bebas dari sebarang halangan. PK telah terkhilaf dalam menafsir perkara II dan IV SPA, bahawa hartanah tersebut adalah bebas dari halangan dan menaikkan harga belian kepada RM1.6 juta setiap satu untuk membayar penebusan, tunggakan dan perbelanjaan lain (lihat perenggan 51).

(4) PK telah gagal untuk menghargai dan memberi pertimbangan sewajarnya kepada fakta yang tidak dipertikaikan bahawa defendan pertama telah membayar sepenuhnya harga pembelian dan SPA mempunyai tarikh penyempurnaan dan tarikh penyelesaian lanjutan perjanjian tambahan. Defendan pertama telah memenuhi obligasi kontraknya mengenai terma pembayaran yang dipersetujui (lihat perenggan 52).

(5) Mahkamah bersetuju dengan hujahan defendan kedua bahawa dapatan PK adalah salah kerana pertama, kes plaintif tidak menyatakan di dalam kesnya bahawa defendan pertama adalah pemberi pinjam wang dan kedua, dapatan itu adalah jelas tidak benar kerana ianya adalah berdasarkan andaian bahawa jumlah yang didakwa dibayar oleh plaintif pertama adalah faedah yang berlebihan apabila pembayaran itu sendiri tidak disokong oleh sebarang bukti. Walaupun mahkamah mengambil maklum peruntukan s 10OA Akta Pemberi Pinjam Wang 1951 bahawa bukti pinjaman tunggal dengan faedah adalah satu anggapan perniagaan peminjaman wang, adalah menjadi undang-undang mantap bahawa bukti menjalankan perniagaan pinjaman wang memerlukan bukti dalam beberapa tahap sistem dan perlu wujudnya kesinambungan ('continuity') dalam kes ini. Oleh itu, alasan utama tuntutan plaintif, iaitu SPA dengan defendan pertama berkenaan hartanah tersebut adalah transaksi pinjaman wang palsu tidak berjaya dibuktikan. PK adalah terkhilaf membuat dapatan tersebut dan membuat perintah tersebut terhadap defendan pertama (lihat perenggan 53–54 & 58).

(6) Mahkamah bersetuju dengan hujahan defendan kedua bahawa jika benar terdapat salah nyata oleh defendan kedua sebagai peguam cara SPA bagi kedua-dua pihak, ianya adalah salah nyata yang tidak disengajakan di dalam pliding. Plaintif jelas gagal membuktikan bahawa defendan kedua telah membuat kenyataan palsu berhubung dokumen yang ditandatangani plaintif di pejabat plaintif. Oleh kerana elemen asas tort salah nyata tidak dibuktikan, tuntutan tersebut adalah tidak boleh dipertahankan (lihat perenggan 62 & 66).]

Cases referred to

Balakrishnan a/l Devaraj & Anor v Admiral Cove Development Sdn Bhd [2010] MLJU 576; [2010] 7 CLJ, CA (folld)
Govindasamy s/o Muthulingam v Ooi Kee Chye & Anor [2012] 7 MLJ 254, HC (refd)
Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)
Larut Matang Supermarket Sdn Bhd v Liew Fook Yung [1995] 1 MLJ 375, HC (refd)
Sim Thong Realty Sdn Bhd v Teh Kim Dar @ Tee Kim [2003] 3 MLJ 460; [2003] 3 CLJ 227, CA (refd)
Yeep Mooi v Chu Chin Chua & Ors [1981] 1 MLJ 14, FC (folld)
Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152, SC (refd)

Legislation referred to

Contracts Act 1950 ss 18, 24, 66
Evidence Act 1950 ss 73A, 114(g)
Moneylenders Act 1951 s 10OA

Appeal from: *Chandra Segar a/l L Marullamulth & Anor v APE Electrical Sdn Bhd & Anor* [2019] MLJU 216 (High Court, Shah Alam)

Lee Sze Yin (ST Lee & Partners) in Appeal No B-02(NCVC)(W)-1785–09 of 2018 for the appellant.
Ramdari Rama Velu (with Ramanathan Velu) (Rama Velu & Assoc) in Appeal No B-02(NCVC)(W)-1786–09 of 2018 for the appellants.
Ramdari Rama Velu (with Ramanathan Velu) (Rama Velu & Assoc) in Appeal No B-02(NCVC)(W)-1785–09 of 2018 for the respondent.
Lee Sze Yin (ST Lee & Partners) in Appeal No B-02(NCVC)(W)-1786–09 of 2018 for the first respondent.
Goh Gin Jhen (with Sonia Chan) (Lim Kian Leong & Co) in Appeal No B-02(NCVC)(W)-1786–09 of 2018 for the second respondent.

Gunalan Muniandy JCA:

INTRODUCTION

[1] Before us are two appeals which, for convenience we would refer to as Appeal No 1785 and Appeal No 1786 ('first and second appeals'). The first appeal is by the first defendant ('D1') in the civil suit heard by the learned judicial commissioners ('LJC') in the Shah Alam High Court whereas the second appeal is by the plaintiffs ('P1 and P2') in the same civil suit. The appellant ('D1') in the first appeal is dissatisfied with the LJC's decision to allow the plaintiffs' claim against him and dismiss his counterclaim whereas the appellants ('P1 and P2') in the second appeal are dissatisfied with the LJC's decision to invoke s 66 of the Contracts Act 1950 and consequentially, to order

restitution to the original positions three pieces of landed properties that originally belonged to the plaintiffs that were the subject of the suit before the High Court ('the subject properties'). A

FACTUAL BACKGROUND

B

[2] The plaintiffs are husband and wife. The first plaintiff owned a double-storey shop house and a double-storey link house held under GRN 370218 Lot 122677 and HS(D) 428428 PT 137859 Mukim Tebrau Johor Bharu ('the JB property'). The second plaintiff owned a double-storey shop house held under HS(D) 126932 Lot PT 121452 Bandar Klang, Selangor ('the Klang property'). C

[3] The first defendant is an electrical company incorporated in Malaysia and the second defendant is an advocate and solicitor of the High Court of Malaya. D

THE PLAINTIFFS' CASE

[4] The plaintiffs were facing financial constraints in their businesses and approached an acquaintance known as 'Ang' Jenjarom ('Ang') to assist the plaintiffs to obtain a loan in the sum of RM1.25m. E

[5] Ang then introduced the plaintiffs to moneylenders by the name of 'Thomas Ang' and 'Tham' ('Thomas Ang' and 'Tham') who then agreed to lend the said sum on condition the plaintiffs pledge their properties as security for the loan with interest payable at 6% per month and a further condition that loan agreements are to be entered for the said loan. F

[6] Thomas Ang and Tham later brought the plaintiffs to the second defendant's ('D2's') office. D2 has prepared legal documents for the said loan so that the plaintiffs could sign the same at that instant. G

[7] The plaintiffs contended that at D2's office, before signing the said documents which had already prepared by D2 for the above loan, D2 allegedly represented to the plaintiffs that the documents are only loan documentation and that once the plaintiffs had fully settled the said loan, the said documents will be cancelled. H

[8] On the representation made by D2, on 14 January 2015, the plaintiffs signed the several documents presented to them by D2. I

[9] After the documents has been signed by the plaintiffs, the plaintiffs requested D2 to forward all copies of the documents signed so that the

plaintiffs could refer to their own solicitor for comments. D2 informed the plaintiffs that she shall forward the documents later. However, the said documents were never forwarded to the plaintiffs (which later after one year three months down the line, on the request of the plaintiffs' solicitor the said documents were then forwarded).

[10] D2 issued cheques in the sum of RM438,318.10 and RM11,000 respectively to P1 and a sum of RM54,595 to P2 which the plaintiffs were asked to collect on the 27 January 2015, of which they did as requested.

[11] The plaintiffs contended that deductions in advance has been made on the loan amount of RM1.25m amounting to RM225,000 (which reflects 6% monthly interest on RM75,000 at RM1.25m for three months) and a further sum of RM384,000 to be paid to a caveator and a legal fee of D2 in the sum of RM21,000 for her legal services.

[12] Some four months later after signing the said documents, Thomas Ang and Tham met the plaintiffs to collect RM75,000 as interest payment of 6% which was then into the fourth month. The plaintiffs, however, were still facing financial constraints in their said businesses and were only able to pay a sum of RM35,000 and thereafter, the plaintiffs were not able to pay any further.

[13] As the plaintiffs could not comply with the condition of paying the interest thereafter, Thomas Ang and Tham became violent and threatened the plaintiffs. The act of Thomas Ang and Tham had put the plaintiffs in a position of fear for their safety and that of their family. The first plaintiffs then lodged several police reports.

[14] Following a search conducted on the said properties by the plaintiffs' solicitors after one year three months, it was revealed as follows:

(a) the JB property had been transferred to/registered in the name of the first defendant on 28 October 2015;

(b) the Klang property had been transferred to/registered in the name of the first defendant on 30 November 2015; and

(c) a private caveat has been lodged by the first defendant on 18 January 2016.

[15] It was contended by the plaintiffs that at no time had they intended to transfer the said properties to the first defendant.

[16] The plaintiffs further stated that at the time of the said request for the loan, the properties were already charged to banks. In the said circumstances, the plaintiffs lodged private caveats on the said properties on 15 July 2016 and 17 July 2016, respectively.

[17] The plaintiffs claimed that they were misrepresented into signing three sale and purchase agreements and two supplemental agreements which they thought were loan documents.

THE DEFENDANTS' CASE

[18] The first defendant had been informed by Mr Tham See Ho that there were three properties offered for sale.

[19] After obtaining advice from the second defendant, the first defendant instructed the second defendant to prepare the sale and purchase agreements and all the related transfer documents.

[20] The first defendant had been informed by the second defendant that the sale and purchase agreements were ready for signing. The first defendant's directors signed at the second defendant's office on 14 January 2015.

[21] After signing, Mr Gui Heang Lim (Mr Gui), the director of the first defendant received a phone call from the second defendant on 14 January 2015 informing him that the plaintiffs requested supplemental agreements to be signed to state RM1.6m each for the JB property and the Klang property and the first defendant would be granted an extension of three months to pay the balance purchase prices. Mr Gui agreed with the said request and instructed the second defendant to prepare the supplemental agreement.

[22] After the sale and purchase agreements had been completed, the plaintiffs refused to deliver vacant possession.

[23] The first defendant filed a counterclaim in that they had overpaid the plaintiffs for all the properties.

[24] The second defendant contended that there was no misrepresentation by them to the plaintiffs. It is the second defendant's case that, there was no money lending transaction but instead only bona fide sale and purchase transactions for the subject properties.

DECISION OF THE HIGH COURT

[25] After full trial, the LJC found that the plaintiffs and the first defendant were in a money lending arrangement. The sale and purchase agreement as well as the supplemental agreements entered into were illegal and void under s 24 of the Contracts Act 1950. The LJC also found that there was no misrepresentation by the second defendant. Accordingly, the LJC adjudged as follows:

(a) the plaintiffs' claim against the defendants is dismissed;

(b) the first defendant's counterclaim is dismissed; and

(c) the plaintiffs and the first defendant to restore whatever advantages that they have received from each other.

[26] Dissatisfied with the said decision, both the plaintiffs and the first defendant lodged the respectively appeals to the Court of Appeal.

OUR ANALYSIS AND DECISION

[27] Briefing, the LJC ordered both properties that had been transferred from P1 and P2 respectively to D1 to be returned to them and the plaintiffs were, consequentially, ordered to refund the sum of RM3,781,450.05 ('the purchase price') to D1.

[28] We will begin by looking at the plaintiffs' pleaded case. They were husband and wife who had allegedly executed the sale and purchase agreements ('SPAs') to transfer the said properties to D1 at the office of the SPA solicitor ('D2'), who was the second respondent in Appeal 1786. They pleaded that the documents signed by them at Venny's office were for moneylending purpose for a sum of RM1.25m and to pledge their three properties to the moneylender as security. They further asserted the documents were 'clothed' into SPA transactions without their knowledge.

[29] D1 pointed out to us that during the trial the plaintiffs denied having received any cash payments from APE (appellant) under the SPAs whereas they had expressly pleaded in paras 8, 18.1 and 26 of their reply to the amended statement of defence and counterclaim dated 6 October 2017 that they had acknowledged receipt of cash payments from APE (D1).

[30] According to the pleaded claim, the moneylenders were one 'Thomas Ang' and one 'Tham' who had agreed to give them a loan of RM1.25m. Neither of the two alleged moneylenders were brought in as defendants in the plaintiffs' suit without any explanation being offered.

[31] The appellants submit that their case is to be gleaned from their own testimonies and the evidence in support given by their witnesses at the trial.

[32] The first appellant (PW1)'s testimony was that, prior to receiving the payment cheque, he was made to sign several documents, the contents of which were unknown to him at the office of the first respondent's solicitor (second respondent). It was basically alleged that the said moneylenders, 'Thomas Ang' and 'Tham' brought the appellants' to the second respondent's office, a solicitor, who had prepared legal documents for the said loan so that the appellants' could sign the same.

[33] The appellants' contend that at the second respondent's office, before signing the said documents which were already prepared by the second respondent for the said loan, the second respondent (solicitor) represented to the appellants that the documents that had been prepared and to be signed/executed by the appellants were loan documentation and that once the appellants had fully settled the said loan, all these documents will be cancelled.

[34] It was allegedly on the representation made by the second respondent ('R2') that on 14 January 2015 the appellants signed several documents with the specific instruction to R2, 'Thomas Ang' and 'Tham' that the documents are for a loan and the said documents are to be cancelled once the appellants have fully settled the loan.

[35] Despite the appellants' request for copies of the documents executed by them at R2's office to be forwarded to them for reference to their own solicitor, R2 had allegedly failed or neglected to do so as agreed until about one year three months later and this too only at the request of their solicitor.

[36] In the first appellant's police report, it was alleged that the purported moneylenders were 'Thomas Ang' and 'Tham'.

[37] Importantly, it was pleaded in the amended SOC as follows:

> Upon all the loan documents having been executed by the plaintiffs at D2's firm, D2 released the loan sum of RM1.25m by cheque after making a deduction for D2's legal and a further deduction of 3 months' interest payment at 6% p.a. After the said deduction, the loan sum was only RM1,004,000. However, the appellants failed or neglected to produce D2's cheque for this lesser sum as evidence to prove that the alleged deductions had been made to the purported loan to the appellants.

[38] Another important averment by the appellants is that after three months had passed from the date of release of the loan, the said moneylenders

confronted them demanding interest payments amounting to RM75,000. However, they could only afford to pay RM35,000 while the balance from the sum demanded remained unsettled.

[39] We would pause here to take note of the issue raised by the appellant APE that the alleged payments by P1 of interest in the sum of RM35,000 to APE following the demand by 'Thomas Ang' ('TA') and 'Tham' had not been proved. In this regard, it is crucial to examine the evidence relied upon by P1 as to the purported interest payment. As pointed out by APE, the Maybank bank-in slips tendered were not legible or readable and no bank officer from Maybank was called as a witness to testify on the contents of the said bank-in slips which, thus, remained marked as ID documents and unproven. By virtue of s 73A of the Evidence Act 1950, these slips were inadmissible and could not be admitted into evidence or taken into consideration to determine the issue in dispute as to whether APE had received the said interest payments from P1. Hence, based on the unsupported oral evidence of P1 alone, the alleged monthly interest payments by P1 and P2 to APE and/or receipt by APE of the same had clearly not been proved.

[40] It was important for us to bear in mind that the plaintiffs pleaded cause of action against the respondents was that the SPAs in respect of the three subject properties were sham documents in disguise for illegal moneylending transaction/agreement ('MLA'). The predominant feature or characteristic of a MLA is the payment of interest to the lender, which, in this instance, APE was alleged to have received as a moneylender.

[41] Our attention was drawn to the evidence-in-chief of the first appellant vide his witness statement wherein he alleged that interest payments meant for APE had been paid into the bank account of one 'Lau Wei Kian' ('LWK') on the instruction of TA and Tham as Lau Wei Kian was their 'runner' or 'collector'. It was rightly highlighted to us that none of these facts was pleaded by the plaintiffs and as such, it would offend the cardinal rule of pleadings for their claim to be decided on unpleaded facts. Any evidence adduced on the same should in principle be rejected and not given any consideration in determining this contentions issue of fact. This is clearly in line with established principles on pleadings.

Reference made to:

(a) *Govindasamy s/o Muthulingam v Ooi Kee Chye & Anor* [2012] 7 MLJ 254;

(b) *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196; and

(c) *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152.

[42] Critically, it was important for us to consider that the plaintiffs' evidence on the above allegation was glaringly lacking on crucial facts. Firstly, evidence to prove that APE had received the interest payments allegedly made by the first appellant was not forthcoming. Secondly, there was no proof that either TA, Tham or LWK had forwarded the interest payments to APE. Thirdly, there was also no proof that the purported loan or any part thereof had been paid to APE by instalments as allegedly agreed upon.

[43] Proceeding now to the events that occurred at the office of the second respondent ('Venny'), the plaintiffs' allegation in support of their pleaded claim was as follows:

> ... that they were not aware that the documents signed by them at Venny's office were for sale and purchase transactions and they were not aware that APE had paid the redemption sums to the Banks. Chandra & Philomena ('Appellant 1 and 2') denied having received any letters from the Banks.

[44] We were referred to documentary evidence that plainly indicated otherwise, contrary to the stance taken by the plaintiffs. There was the redemption letter issued by OCBC Al-Amin Bank dated 22 May 2015 which had been duly received on behalf of a sole proprietorship that belonged to the second plaintiff. The said redemption letter had been copied to the first plaintiff as the 'Chargor' and the company that belonged to both the plaintiffs as the 'Borrower'. Hence, there can be no doubt that the plaintiffs were fully aware of the banks' letters but did not raise any objections or prevent the banks from receiving the redemption sums from APE. Furthermore, Chandra ('P1') had acknowledged that he did not pay the monthly loan instalments to the banks.

[45] The LJC had rightly found that the plaintiffs in fact knew that the documents which they had executed were SPAs for their properties. However, the LJC instead gave weight to a telephonic messaging ('SMS') exchange between the first plaintiff and the said TA in concluding that the SPAs were not outright SPA transactions. By relying on the SMS texts, between Ang@funder/Thomas Ang and Chandra, the LJC formed the view that the transactions that went through at D2's office were not outright sale and purchase transactions.

[46] As to whether the LJC had erred in wrongly concluding as such, we were urged to consider the following salient factors:

(a) the payment vouchers, the SPAs, the supplemental agreements, the authorised letters and all the related transfer documents were signed by Chandra & Philomena ('plaintiffs') at Venny's office. They were fully

A aware that the documents signed by them were for sale and purchase purposes as faired by the LJC himself;

(b) no satisfactory evidence was forthcoming to prove that APE was the funder for the purported loan sum of RM1.25m. The identity of the
B alleged funder was uncertain;

(c) no evidence was as adduced in court that Chandra & Philomena had received any loan sum from the alleged moneylenders 'Thomas Ang' and 'Tham';

C (d) Thomas Ang and Ang@funder were not called to testify in court in respect of the SMS texts;

(e) PW6 (the investigating officer) did not find any SMS texts between Thomas Ang, Ang or Lau Wei Kian and APE/Mr Gui; and

D (f) contradictions arose between the defendants' testimonies and their pleading. In their pleading, it was averred that D2 released the loan by cheque less deduction for legal fee and three monthly interest payments at 6% of the loan sum of RM1.25m whereas their testimony was that they had only received cheque payments from APE totalling
E RM503,913.10.

[47] The LJC's view, the correctness of which was strongly challenged by the defendants, was that the presence of Ang, TA and Tham at Venny's office at the time of signing of the documents showed that they were interested parties and
F thus, the LJC was inclined to believe that APE was the boss and/or employer referred to in the SMS text messages alluded to.

[48] The explanation by D2 for the presence of these three persons at her office at the material time was highlighted to us as being of significance. It was
G that their presence was merely to ensure that their consultation/introductory fee was paid. Importantly too, the name of APE or its employee (one 'Mr Gui') was absent from the impugned SMS texts. It would, therefore, appear to be correct, as contended, that the LJC had made a baseless inference to the effect that APE was the boss and/or employer referred to in the SMS texts. It bears
H reiteration that the contents of the SMS texts figured prominently in the LJC's finding that APE's role in the impugned transactions was as an employer. It followed that the factual basis for the LJC's finding on this issue was plainly misconceived.

I **[49]** Next for deliberation is the alleged payment by the first plaintiff to LWK which was not specifically pleaded. In the LJC's view, this fact need not be specifically pleaded as it went to the details concerning to whom and how the payment was to be made. As we have adverted to, the first plaintiff's evidence did not merely go into details of the payment but also alleged that

LWK was a runner/collector for TA and Ang, on whose instruction he acted and made the payment into LWK's account.

[50] We are not in agreement with the LJC on this important point. We agree with the defendants that first plaintiff sought to prove vide his witness statement material facts and obviously not mere details relating to how and to whom the alleged interest payment was to be made. If, as alleged, LWK was the runner/collector for TA and Ang, he was indeed a material witness and his being called as a witness was crucial to resolve the issue as to whether interest payments were demanded from the plaintiffs and received by APE considering that there was no evidence at all of the receipt. This was clearly an instance of error of law by the LJC in failing to invoke s 114(g) of the Evidence Act 1950 and draw an adverse inference against the plaintiffs.

[51] There was also the issue of whether the LJC had misinterpreted the recitals to the three SPAs for the properties in question in holding that the properties were all supposed to be free from encumbrances. In respect of all the three SPAs, the encumbrances are clearly spelt out in Recital II. Recital IV on which the LJC based his finding stipulates that the properties are to be sold free from encumbrances, not that the same were free from any encumbrances. Hence, premised from a misreading of Recital II and IV of the SPAs, the LJC had arrived at a wrong finding that the three properties according to the SPAs were to be free from encumbrances and that the increase of the purchase price to RM1.6m each was to cover redemption, arrears and other expenditure.

[52] An issue was also raised on the correctness of the LJC's view expressed in his judgment that both parties were untruthful with respect to the terms of payment in the SPAs and the supplemental agreement. As highlighted to us, the LJC had failed to sufficiently appreciate and give due weight to the undisputed fact that D1 had fully paid the purchase price within the completion dates of the SPAs and the extended completion date of the supplemental agreements. In short, D1 had fulfilled its contractual obligations in relation to the agreed terms of payment.

[53] We will now proceed to deal with another finding by the LJC that was critical to the plaintiffs' claim founded on illegal moneylending by D1. The LJC had found D1 to be a moneylender carrying on a moneylending business. Importantly too, that D1 had failed to rebut the presumption of moneylending pursuant to s 10OA of the Moneylenders Act 1951 ('the MLA'). We agree with D2's contention that this finding is erroneous because firstly, it was never the Plaintiff's pleaded case that D1 was moneylender and secondly, the finding was plainly incorrect, as it was based on an assumption by the LJC that the sum allegedly paid by the first plaintiff, RM75,000 was excessive interest when the payment itself was not supported by any evidence.

[54] While we appreciate the provisions of s 10OA of the MLA that the proof of a single loan at interest shall raise the presumption of moneylending business by the lender, it is trite law that proof of carrying on a moneylending business requires evidence of some degree of system and continuity in moneylending transaction which was absent in the present case (see *Larut Matang Supermarket Sdn Bhd v Liew Fook Yung* [1995] 1 MLJ 375).

[55] It would be instructive to make reference to *Yeep Mooi v Chu Chin Chua & Ors* [1981] 1 MLJ 14 where it has held that:

> We have on another occasion observed that the Moneylenders Ordinance 1951 does not strike at moneylending but at moneylenders and at the loans lent by them. The Ordinance is never intended to apply to an individual, or any member of the public who lends money event at interest, unless he does so as a business (*Ngui Mui Khin & Anor v Gillespie Bros & Company Ltd* [1980] 2 MLJ 9).
>
> However, the presumption is not irrebuttable. It can be rebutted, inter alia, by the fact that the appellant did not deposit her money with the pawnshop as a business of moneylending — ie she did not carry on the business of moneylending. Section 2 of the Ordinance defines a moneylender, subject to a number of exceptions, to include:
>
> > every person whose business is that of moneylending or who carried on or advertises or announces himself or holds himself out in any way as carrying on that business ...
>
> Thus, the crux of the matter is the lending of money by a person, whose business is moneylending. This is purely as question of fact ...

[56] In our view, it boils down to the question of proof of interest, payments by the plaintiffs to D1 as alleged which as we have noted earlier was wholly lacking and the evidence adduced was far from sufficient to prove this vital element of the claim. In this regard, we concur with D2's contention that the LJC had erred in holding that the non-calling of Ang and Thomas Ang to testify in court was not crucial because the circumstantial evidence is sufficient for him to arrive at the conclusions he made.

[57] From our perusal of the plaintiffs' narrative, particularly in relation to the relationship of these two persons with APE and their role as moneylenders as well as demanding monthly loan interest as runners/collector for APE, it was plainly obvious to us that they were crucial witnesses that needed to be called to establish the plaintiffs' versions. It is settled principle that the onus lies squarely on the plaintiff in any civil action to prove affirmatively each and every vital ingredient of his pleaded claim and he cannot rely merely on bare allegations which was the case in regard to the alleged payment of interest to TA, Ang or LKW.

[58] For the above reasons, we would conclude that the primary premise of the plaintiffs' claim, namely, that the SPAs executed in respect of the properties with D1 was in truth sham moneylending transactions was on the totality of the evidence clearly not established. In our judgment, it was a plain and obvious error on the part of the LJC to find otherwise and make the impugned orders against D1.

[59] Now for the appeal against the decision of the High Court to dismiss the claim against D2 which was founded on the tort of misrepresentation.

[60] First and foremost, it is incumbent for us to peruse the plaintiffs' pleading to ascertain their pleaded case of misrepresentation by D2. The crux of D2's defence is that the pleaded case was innocent misrepresentation which is not actionable. It was pleaded that D2 had misrepresented to the plaintiffs that the documents to be executed at her office were for moneylending purposes and not for sale and purchase of the three properties and negligence, fraud or forgery were never pleaded.

[61] In *Sim Thong Realty Sdn Bhd v Teh Kim Dar @ Tee Kim* [2003] 3 MLJ 460; [2003] 3 CLJ 227 the Court of Appeal held that in the in the absence of a specific and particularised plea of fraud and negligence (as is the case here), the defendant in that case must be taken as asserting a case of innocent misrepresentation.

[62] We are inclined to agree with D2's contention that if there was indeed any misrepresentation by D2 as the common SPA solicitor for both parties, which she denied, it could only be an act of innocent misrepresentation on the pleadings alone.

[63] We must pause to look at the legal principles governing the present cause of action, the relevant statutory provision being s 18 of the Contracts Act 1950 which reads as follows:

> 18 Misrepresentation
>
> 'Misrepresentation' includes —
>
> (a) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believe it to be true;
>
> (b) any breach of duty which, without an intent to deceive, gives an advantage to the person committing it, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; and
>
> (c) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

[64] Refence was rightly made to the instructive decision of the Court of Appeal case of *Balakrishnan a/l Devaraj & Anor v Admiral Cove Development Sdn Bhd* [2010] MLJU 576; [2010] 7 CLJ which held that the elements of misrepresentation are:

(a) there must be a false statement of fact;

(b) the said statement must be material in nature in that a reasonable man would be influenced by it;

(c) the said statement induces the representee to enter into the contract;

(d) to trigger an inducement, two essential elements are necessary:

(i) the representee must in fact rely on the representor's statement in the contract concerned; and

(ii) the representor, at the time of entering the contract, must have the intention, or at least realise, that the statement will, or probably will, be relied upon by the representee.

[65] Our attention was drawn to certain material undisputed and/or admitted facts which went to show that there was no false statement of fact made by D2 to constitute actionable misrepresentation as follows:

(a) there was no documentary evidence on any moneylending agreement at all;

(b) it was not the first time that the appellants were involved in a sale and purchase transactions;

(c) the appellants being directors of several companies were well aware of the binding effect of signing any documents;

(d) the appellants (plaintiffs) admitted that the second respondent as the lawyer for the first respondent, although not obliged to do so, had explained to the appellants the contents of the documents before the appellants signed;

(e) the appellants admitted that they knew the difference between money lending agreement and sale and purchase agreement; and

(f) the appellants signed the SPAs and other necessary related documents to effect the sale.

[66] Bearing in mind the above undisputed or admitted facts which indisputably were borne out by the evidence, the plaintiffs had clearly failed to prove that D2 had made a false statement as to the documents that the

plaintiffs signed at her office. As the core element of the tort of misrepresentation had not been proved, the claim founded on it was not sustainable as concluded by the LJC.

[67] As we were satisfied from our analysis that the evidence led on the existence of a moneylending transaction was wholly unsatisfactory, contradictory and far from sufficient to prove the essential elements of a transaction of this kind, we need not consider whether D2 had knowledge of the said moneylending as apparently found by the LJC.

[68] For completeness, we would reiterate that the existence of the alleged moneylending in accordance with the plaintiffs' pleading was not proved essentially for the following reasons as advanced by D2:

(a) it was pleaded that 'Thomas Ang' and 'Tham' to advance a loan sum of RM1.25m to the appellants — Thomas Ang was never called to testify and it was only put to Tham by the appellants' counsel that Tham was a runner and not a moneylender;

(b) appellants to charge their three properties as securities for the loan — the titles of the properties were with the banks and there could be no effective security for any moneylender at all;

(c) appellants agreed to repay a monthly 6% interest of loan — the only evidence of payment was IDP8 which is inadmissible and the recipient, Lau Wee Kian was never called to testify; and

(d) parties to enter into a moneylending agreement — there is no documentary evidence of any such agreement at all.

[69] Finally, we need to emphasise in relation to the pleaded case against the defendants that the LJC had erred in principle that D1 was a moneylender when it was never the plaintiffs' pleaded case. That being so, the finding of the LJC that at the material time, D1 was a moneylender was clearly misconceived.

[70] To conclude in respect of the appeal against the decision dismissing the claim against D2, while we are inclined to uphold D2's contention that, on the evidence, the LJC had made a plainly wrong finding that D2 was a party to the alleged moneylending transaction, the LJC had not erred in law or fact in concluding that D2 had not committed any misrepresentation on the plaintiffs in inducing them into executing the SPAs and the supplementary agreements as they were fully aware of the nature and effect of the impugned documents which is purely a finding of fact.

[71] Lastly, we would touch briefly on D1's counterclaim which the LJC had dismissed following his decision on the plaintiffs' suit. The LJC's decision to dismiss D1's counterclaim is the subject of the appellant's complaint in the first appeal.

[72] We note that in the LJC's judgment, there is no discussion or finding on the merits of the counterclaim presumably because the decision followed the outcome of the main suit where judgment was entered in favour of the plaintiffs centred primarily on the finding that the SPAs were in truth illegal moneylending transactions. Likewise, in the present appeals, the outcome of Appeal No 1786 by the plaintiffs/appellants would depend on the decision in No 1785 where the appellant is the first defendants (D1). As Appeal No 1785 has been allowed primarily on our view favouring the defendants' contention that the SPAs for the subject properties were genuine and valid by which the appellants in the second appeal were bound, our decision is Appeal No 1786 would follow that it is devoid of merits in law and fact and accordingly, has to be dismissed with costs.

[73] However, in allowing Appeal No 1785 we declined to make an order in respect of the prayer in the counterclaim for exemplary damages as it had no evidential or factual basis, hence, we affirm the LJC's order to reject this relief.

[74] We would state that by reason of our decision in Appeal No 1785, the plaintiffs appeal against the decision of the LJC to invoke s 66 of the Contracts Act 1950 and order restitution for both parties to be restored to the original positions or status quo would be rendered academic and redundant. We would, hence, not express any views on this aspect of the appeal.

First defendant's appeal (Appeal No 1785) allowed; and plaintiff's appeal (Appeal No 1786) dismissed with costs.

Reported by Mohd Kamarul Anwar